IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.964 OF 2005

Smt. Shubhangi Mahesh Joshi ... Petitioner

Vs.

Smt. Padmaja Bhagwan Joshi ... Respondent

Mr. Uday Warunjikar for the petitioner.

Mr. S.V. Pitre for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 9TH MARCH, 2005.

P.C.:-

1. The petitioner is the original defendant/tenant. The respondent is the original plaintiff/landlord. The suit premises are described in paragraphs 1-A, 1-B and 1-C of the plaint. The premises described in paragraph 1-A were let out for residential purpose. They admeasure about 1000 sq.ft. The premises at paragraph 1-B were let out for the purpose of the study of the defendant's children. They are garage premises admeasuring about 2000 sq.ft. They were let out for a period of 12 years. The premises at paragraph 1-C were let out for car parking. The case of the plaintiff is that initially the premises at 1-A were let out. In the year 1985, there was an agreement dated 20/8/1985 between the plaintiff and the defendant under which premises at 1-B and 1-C were let out to the defendant. According to the plaintiff, the defendant

committed breach of the terms and conditions of the tenancy. The defendant started business in the name and style of "Shubhangi Dresses" in the premises which were let out for residential purpose. The premises described at 1-B were not used for the purpose for which they were let out i.e. they were not used for the children's study. The defendant started using them as work shop for repairs of electric generators. Thus, the user was changed. According to the plaintiff, instead of parking the car at the allotted parking space as described at paragraph 1-C, the defendant started parking the car at different place. The defendant started causing nuisance and annoyance by using the portion of open space which was not let out to her by using it to put flower pots. The plaintiff is a widow. The defendant is taking advantage of this fact and causing annoyance and nuisance to her. In short, the case made out by the plaintiff is non-user, change of user and nuisance. The defendant denied the case of the plaintiff and contended that the plaintiff has sold the FSI to two persons viz. Rathi and Lohiya and, at their instance, the plaintiff is harassing the defendant. The trial court decreed the suit on all counts. The lower appellate court confirmed the findings of fact and dismissed the defendant's appeal. Hence, this writ petition.

2. I have heard, at considerable length, Mr. Warunjikar, the learned counsel for the petitioner. Mr. Warunjikar contended that there is a variance between pleadings and evidence. On some points, there are no

pleadings. But the courts have relied upon the evidence without any pleadings. On some aspects, there are pleadings but no evidence. The courts below have ignored this aspect. The learned counsel contended that as regards change of user, only a cash memo having the words "Shubhangi Dresses" is being relied upon by the plaintiff, merely because the name of the defendant is Shubhangi. The cash memo is supposed to have been found by the granddaughter of the plaintiff from the compound. Mr. Warunjikar contended that this is an inherently improbable story. Mr. Warunjikar further contended that certain photographs have been relied upon but, they have not been proved. He contended that the 1985 agreement only covers the garage and parking space. Therefore, residential premises fall outside the purview of the agreement and, cannot be included in the plaint. The learned counsel contended that the appreciation of evidence is perverse and, hence, the impugned judgments and decrees should be set aside.

3. I am unable to agree with the learned counsel for the petitioner. I have been taken through the material portions of the plaint and the evidence by Mr. Warunjikar. In my opinion, there is no such variance between the pleadings and evidence as would reflect on the credibility of the plaintiff’s case. Moreover, when the parties have clearly understood each other’s case, gone for trial and the evidence is led, the court will have to assess the evidence and find out the truth and this is exactly what the courts below have done. In my

opinion, a very technical and legalistic view cannot be taken unless the discrepancies in the pleadings and the evidence are major and indicate falsity of the plaintiff's case. Such is not the case here.

4. Admittedly, the garage was let out to the defendant for the purposes of children's study. This point is clearly urged in the plaint. It is stated that the defendant has been using the garage as workshop for repairs of electric generators and, therefore, the defendant has unlawfully and illegally changed the user of the suit premises. The defendant has, at one stage, admitted that she is doing the business of generator repairs. However, when the photograph was shown to her, she stated that she had kept the generator of her friend. In my opinion, the objection regarding the proof of photographs cannot be sustained because the defendant has admitted the presence of generators in the garage. Besides, the defendant has admitted that she is running a proprietary concern by name Sam Joo Company and the business of that company is of resale of engines and spareparts. Against the background of these established facts, the court is right in saying that there is a change of user. There is no substance in the contention that the 1985 agreement only covers premises at 1-B and 1-C and, hence, the premises at 1-A must be left out. The suit is filed for all properties leased out by the plaintiff to the defendant. Moreover, in the 1985 agreement, there is a reference to property at 1-A also. This submission of the learned counsel must, therefore,

fail. In my opinion, the concurrent findings of fact are unassailable. Hence, the writ petition is rejected.

5. At this stage, Mr. Warunjikar, the learned counsel for the petitioner states that the petitioner is a senior citizen and, hence, two years' time may be given to the petitioner to vacate the suit premises. Mr. Pitre strenuously opposes this prayer. In my opinion, in the facts and circumstances of the case, a period of one year should be given to the petitioner to vacate the suit premises on the petitioner and all adult members of her family filing usual undertakings in this court within a period of four weeks from today. Needless to say that the petitioner will have to pay the arrears of rent.

6. C.C. expedited.

(SMT. RANJANA DESAI, J.)